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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

FRANKLIN & FRANKLIN et al.,

Plaintiffs and Appellants,

v.

JAMES ALBERTS et al.,

Defendants and Respondents.

D043718

(Super. Ct. No. 808211)

APPEAL from an order of the Superior Court of San Diego County, Linda Quinn,
Judge. Affirmed.

This court is familiar with the parties on appeal: James and Candace Alberts and their former attorney, David Franklin. In a prior action, the Albertses sued Franklin and his law firm (collectively Franklin) arising from Franklin's representation of the Albertses in two matters during which Franklin took positions adverse to the Albertses' interests. After a lengthy trial, the jury found Franklin breached his fiduciary duties and committed defamation, and awarded the Albertses more than \$1.3 million in compensatory and

punitive damages, which the trial court later reduced by approximately \$468,000. We recently filed a 71-page unpublished opinion affirming that judgment, and rejecting Franklin's numerous appellate contentions. (*Alberts v. Franklin* (June 16, 2004, D040310) [nonpub. opn.].)

While that appeal was pending, Franklin sued the Albertses for malicious prosecution based on the fact that the Albertses were unsuccessful on a professional negligence claim asserted against him in the Albertses' otherwise successful prior lawsuit. The Albertses moved to strike Franklin's complaint under the anti-SLAPP statute. (Code Civ. Proc., § 425.16.) Franklin agreed the anti-SLAPP statute applied, but argued the motion should be denied because there was a probability he would prevail on his malicious prosecution claim. The trial court found Franklin did not meet his burden to show a probability of prevailing, and granted the motion to strike. Franklin appeals. We affirm.

RELEVANT FACTS AND PROCEDURE

*Background Facts*¹

In 1993, the Albertses operated three 7-Eleven franchises and belonged to a 7-Eleven franchisee organization. In August 1993, this organization retained Franklin as lead attorney to file a class action complaint against 7-Eleven's franchiser (Southland)

¹ Because we recently detailed the facts underlying the prior action, we provide only a summary here. A reader interested in learning the more complete facts may read our prior unpublished opinion, found at *Alberts v. Franklin*, 2004 WL 1345078. When necessary for clarity, we shall use the plaintiffs' first names, James and Candace.

and several Southland suppliers (the Class Action). James was a named plaintiff in the Class Action, and was active in the litigation. Candace was a member of the class.

The next year, Southland closed a 7-Eleven store operated by Candace. Under the franchise agreement, Southland agreed to transfer Candace's franchise to an El Centro store, but imposed a contract condition that the Albertses sign a "release of this agreement," which Southland interpreted as including a release of the Albertses' Class Action claims. The Albertses refused to sign the release and Southland thus refused to allow the transfer to the El Centro store.

In June 1995, the Albertses retained Franklin to file a lawsuit against Southland concerning the El Centro store release dispute. Franklin initially filed a complaint in superior court, but the action was later removed to federal court (the Personal Action). At the time, Franklin was lead counsel in the Class Action, but he did not advise the Albertses of potential conflicts in the dual relationship. Two years later, in July 1997, the federal district court granted Southland's summary judgment motion against the Albertses in their Personal Action. Franklin filed a notice of appeal on the Albertses' behalf.

Meanwhile, during this same time period, in late 1996 and early 1997, the various plaintiff law firms in the Class Action had substantial disagreements about the settlement value of the claims. In early August 1997, James (with Franklin's approval) personally met with Southland representatives and reached a tentative settlement agreement, totaling approximately \$63 million to current franchisees in cash, non-cash components, and attorney fees and costs. The next month, the proposed settlement agreement was revised and the monetary amounts going to the class members were lowered. James nonetheless

actively supported this revised settlement, as did many other named class members and several class counsel.

In mid-September 1997, while he was still the Albertses' attorney of record in the their Personal Action, Franklin actively opposed the revised proposed settlement agreement, and spoke negatively of James's support of the proposed settlement of the Class Action. In the Class Action proceedings, Franklin filed a motion seeking to remove James (and others) as named class representatives. In a supporting memorandum, Franklin argued the class representatives should be removed because there were conflicts of interest between these representatives and the Class. As to James, Franklin claimed that James had placed his interest in settling the Personal Action over the Class's interest in a fair and adequate settlement of the Class Action. Franklin said that James had been one of the "hardliners" in his approach to the class litigation, and the only conceivable explanation for James's negotiation and support of the current settlement proposal was that Southland had "promised [him] something extra if [he] would promote the proposed settlement."

In his declaration in support of the motion, Franklin averred that Southland's counsel had told him that Southland would work out a resolution of the Albertses' Personal Action directly with James. Franklin stated: "Since that time, I have heard nothing further about the matter from [Mr. Alberts] or anyone else. However, *based upon what I know*, it is my belief that [Southland] offered a deal to [Mr. Alberts] for agreeing to sign the proposed settlement agreement." (Italics added.) Franklin attached confidential documents to his declaration. Southland filed opposing papers, denying the

accusation that Southland had offered anything to James in exchange for the settlement of the Class Action on the proposed terms.

In October 1997, while he was still representing the Albertses in the Personal Action, Franklin filed reply papers in which he asserted that the evidence was "overwhelming" that James engaged in "self-dealing" and had "selfish motive[s]" when he negotiated a settlement of the Personal Action at the same time that he negotiated the proposed settlement of the Class Action litigation. Franklin accused James of having a "very dramatic conflict of interest with the absent class members."

Not surprisingly, the next month, the Albertses terminated their relationship with Franklin in the Personal Action, and substituted another law firm to represent them in their appeal in the Personal Action. That same month, the trial court in the Class Action rejected Franklin's claim that the proposed class action settlement was the result of fraud and collusion.

In March 1998, Franklin filed objections to the proposed class action settlement on behalf of another class member and again charged that James had a conflict of interest between the Class Action and his Personal Action. The court ultimately approved the proposed settlement agreement, finding the objections were without merit and the settlement was fair and reasonable. The approved settlement agreement allocated \$4.75 million to class counsel as attorney fees, \$1.2 million of which was awarded to Franklin's law firm. Franklin appealed the court's approval of the settlement on behalf of another class member, but the appellate court affirmed the judgment.

The Albertses' Lawsuit Against Franklin

In June 1998, the Albertses filed an action against Franklin, alleging breach of fiduciary duty, professional negligence, and defamation.² The complaint alleged Franklin breached his fiduciary duties by: failing to disclose actual and potential conflicts of interest; improperly disclosing client confidences and communications protected by the attorney-client privilege and work product doctrine; promoting Franklin's best interests and the interests of other clients at the expense of the Albertses' best interests; asserting positions adverse to the Albertses' best interests, including falsely accusing James of fraud, collusion and self-dealing to members of the general public and the 7-Eleven franchise community; compelling James to testify as a witness in the November 1997 hearing and cross-examining him by using confidential attorney-client communications without his consent; and engaging in a persistent pattern of outrageous conduct designed to humiliate, damage, embarrass and harm the Albertses.

In the professional negligence cause of action, the Albertses realleged each factual allegation that was the basis for the breach of fiduciary duty claim, and additionally alleged that, in representing the Albertses in the Personal Action, Franklin breached the applicable professional standards of care required by the rules of professional responsibility.

Franklin moved for summary adjudication with respect to the breach of fiduciary duty and professional negligence causes of action. On the professional negligence claim,

Franklin argued that he was entitled to judgment as a matter of law because there was no evidence that he was negligent and the undisputed facts showed that his alleged negligent conduct did not cause any damage to the Albertses because Southland ultimately permitted the Albertses to transfer their store and the Personal Action "was not winnable."

In denying the motion as to both causes of action, the court found "a triable issue of material fact as to whether [Franklin] breached [his] fiduciary duties to Plaintiffs and/or breached the standard of care by publicly disclosing documents or information which would be detrimental to Plaintiffs . . . " and by cross-examining James in the Class Action proceedings. The court also found "triable issues of material fact as to whether [Franklin's] conduct caused Southland to reduce the amount of compensation to the class representatives . . . , thereby causing [the Albertses] economic damages and/or caused Plaintiffs to suffer emotional distress."

At the ensuing trial, John Seitman, an expert witness on the applicable standard of care, testified that Franklin breached a duty of loyalty and breached professional standards of care by taking positions adverse to the Albertses' interests while he was representing them in the Personal Action. Seitman said that Franklin's actions fell below the standard of care because he failed to comply with the requirements of Rule 3-310 of the Rules of Professional Conduct, requiring an attorney to avoid the representation of adverse interests. Seitman opined that Franklin breached his professional obligations by

2 The Albertses had also alleged intentional and negligent infliction of emotional

failing to obtain the Albertses' informed written consent to the representation which presented a potential (and later actual) conflict of interest.

At the conclusion of the Albertses' case at trial, Franklin moved for a nonsuit on the Albertses' breach of fiduciary duty and malpractice causes of action. The court denied the motion on the breach of fiduciary duty claim, but granted the nonsuit on the malpractice claim. With respect to the breach of fiduciary duty claim, the court reasoned that there was sufficient evidence from which a jury could find Franklin breached his fiduciary duties, and the Albertses were entitled to recover on that cause of action even if they did not suffer any economic loss from the breaches. However, with respect to the malpractice claim, the court found that although there was evidence that Franklin breached the standard of care by representing the Albertses in the Personal Action without obtaining a waiver, there was no evidence that this conduct caused the Albertses to suffer any *economic* damages. The court found that unlike a breach of fiduciary duty claim, a malpractice claim requires a showing of economic loss. The court further found there was no evidence as to whether Franklin's advice not to sign the El Centro store release fell below the standard of care or caused the Albertses to suffer any damages.

On a special verdict, the jury awarded compensatory damages of approximately \$43,000 to each plaintiff on their breach of fiduciary duty claims, and awarded James

distress, but those claims were later dismissed on Franklin's motion to strike.

\$197,643.75 on the defamation claim.³ The jury also awarded punitive damages of \$527,000 against Franklin and \$527,000 against Franklin's law firm. On post-trial motions, James agreed to a reduction of the punitive damage award by \$134,000 against Franklin and a reduction of \$334,000 against Franklin's law firm. The judgment was entered accordingly.

Franklin appealed the judgment, asserting numerous evidentiary and instructional errors and challenging many of the court's legal rulings pertaining to liability and compensatory and punitive damages. In a 71-page opinion, this court unanimously rejected each of these contentions and affirmed the judgment. (*Alberts v. Franklin, supra*, D040310.)

Malicious Prosecution Claim At Issue in this Appeal

While Franklin's appeal was pending, Franklin filed a malicious prosecution complaint against the Albertses, alleging the Albertses were liable for his emotional distress and attorney fees because there was no reasonable basis to have included a professional malpractice claim in their otherwise successful breach of fiduciary duty lawsuit against him.

The Albertses moved to strike the complaint under the anti-SLAPP statute. The Albertses argued the anti-SLAPP statute applied and that Franklin could not show a probability of prevailing on his malicious prosecution action because he could not

³ To avoid double-counting of damages, the court awarded James only the \$197,643.75 (and not the \$43,000) for compensatory damages.

establish the Albertses lacked probable cause to assert the professional malpractice claim. In opposing the motion, Franklin agreed the matter was governed by the anti-SLAPP statute, but argued the Albertses did not have probable cause to bring the malpractice claim because that claim was based on James's "false testimony" that Franklin had advised him not to sign the El Centro store release. To support this assertion, Franklin relied primarily on his own declaration in which he claimed that "James Alberts falsely stated that he met with me on August 29, 1994, in order to obtain advice as to how he would handle the [release] issue. Mr. Alberts falsely stated that I advised him not only once, but twice, that he and his wife could not sign that [release agreement]. I had no meeting with James Alberts on August 20, 1994 at my law office as alleged by Mr. Alberts, because I was not in my office that day."

The court thereafter permitted the parties to submit additional briefs and evidence on whether Franklin could establish malice, a separate element of malicious prosecution that requires a showing that the prior claim was brought for a subjectively improper purpose. In his supplemental papers, Franklin argued that the evidence showing that James "lied" when he stated that Franklin told him not to sign the El Centro store release establishes that the Albertses included the malpractice claim in their prior lawsuit for improper motives. The Albertses submitted responsive declarations, stating their motivation for asserting the professional negligence claim was to seek redress of their grievances, and they did not bring the claim for an improper purpose.

The court granted the Albertses' anti-SLAPP motion based on its finding that Franklin did not meet his burden to show a probability of success on the malice element.

DISCUSSION

I. *Generally Applicable Principles*

Franklin concedes his malicious prosecution action arises from acts in furtherance of the Albertses' petition rights and therefore his action is subject to the anti-SLAPP statute. (See *Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 741.) Thus, the issue here is whether Franklin met his burden to show a "probability" that he will prevail on his malicious prosecution claim. (§ 425.16.) To meet this burden, Franklin was required to present evidence that, if believed by the trier of fact, was sufficient to support a judgment in his favor. (*Zamos v. Stroud* (2004) 32 Cal.4th 958, 965.) In deciding the question of potential merit, the trial court considers the parties' pleadings and evidentiary submissions. (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821.) The court does not weigh the credibility or compare the strength of competing evidence, but merely determines if there is sufficient evidence to show the plaintiff can satisfy each element of his or her claim. (*Ibid.*) An appellate court applies a de novo review to this determination. (*Zamos v. Stroud, supra*, 32 Cal.4th at p. 965.)

To establish a malicious prosecution action, the plaintiff must prove the prior action was (1) brought (or continued) without probable cause; (2) initiated with malice; and (3) pursued to a legal termination in his or her favor. (See *Zamos v. Stroud, supra*, 32 Cal.4th at pp. 965-966; see *Padres L.P. v. Henderson* (2003) 114 Cal.App.4th 495, 513.) Each of these elements must be proved to prevail on a malicious prosecution cause of action. (*Zamos v. Stroud, supra*, 32 Cal.4th at p. 965; *Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 871-872 (*Sheldon Appel*).) Thus, in opposing the anti-

SLAPP motion, Franklin was required to show a probability of prevailing on each element of the claim. As explained below, Franklin failed to meet his burden to show a prima facie case on the probable cause and malice elements.

II. *Probable Cause*

To determine whether the "without probable cause" element of a malicious prosecution claim is met, a trial court must make an objective determination of the "'reasonableness' of the defendant's conduct, i.e., to determine whether, on the basis of the facts known to the defendant, the institution of the prior action was legally tenable." (*Sheldon Appel, supra*, 47 Cal.3d at p. 878.) If any reasonable attorney would have considered the action legally tenable, the probable cause element cannot be established. (*Ibid.*) "This 'lenient standard' for bringing a civil action reflects 'the important public policy of avoiding the chilling of novel or debatable legal claims' and allows attorneys and litigants "'to present issues that are arguably correct, even if it is extremely unlikely that they will win'" (*Padres L.P. v. Henderson, supra*, 114 Cal.App.4th at p. 517, quoting *Wilson v. Parker, Covert & Chidester, supra*, 28 Cal.4th at p. 817.) "Only those actions that any reasonable attorney would agree are totally and completely without merit may form the basis for a malicious prosecution suit." (*Zamos v. Stroud, supra*, 32 Cal.4th at p. 970.) A lack of probable cause for a particular cause of action may be established even though a party had reasonable cause to bring the other claims asserted in the complaint. (*Crowley v. Katleman* (1994) 8 Cal.4th 666, 676-692; *Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 55-59.)

In this case, Franklin attempted to show the Albertses did not have probable cause to assert their professional negligence claim by focusing on one factual theory underlying that claim—the Albertses' assertion at trial that Franklin was negligent in advising them not to sign the El Centro store release. Franklin argues that because he has presented evidence (primarily in the form of Franklin's own declaration) that James did not tell the truth on this particular factual matter, he has presented a sufficient factual record on the probable cause element to avoid a motion to strike.

Even assuming we are required to find Franklin's claim against his prior client would have any credibility with a new jury given the prior jury verdict finding Franklin breached his fiduciary duties and imposing substantial punitive damages for these breaches, the argument is of no help to Franklin. The fundamental problem with Franklin's argument is that the Albertses' malpractice claim—as alleged in the complaint and argued in the summary judgment proceedings—encompassed a much broader scope of alleged wrongful conduct than the theory ultimately proffered at trial. As recognized in our prior opinion, the essence of Franklin's wrongful conduct was that he disregarded his duty of undivided loyalty to the Albertses and actively favored another client over them at the time of the dual representation. As opined by the Albertses' expert, this conduct not only constituted a breach of fiduciary duty but it also amounted to professional negligence. This is consistent with California law. (See *Quintilliani v. Mannerino* (1998) 62 Cal.App.4th 54, 67-68 ["since the breach of fiduciary duty cause of action concerned the attorney's acts and omissions while representing plaintiff, it sounded in legal malpractice . . . "]; see also California Rules of Professional Conduct, rule 3-

310.) On these grounds, the Albertses' claim for professional negligence was legally tenable and Franklin cannot make a prima facie showing that he had a probability of prevailing on his malicious prosecution action.

This conclusion is unaffected by the fact that by the time of trial, the Albertses had essentially divided Franklin's wrongful conduct into two phases: (1) Franklin's pre-August 1997 conduct concerning Franklin's representation in the Personal Action and (2) Franklin's post-August 1997 conduct in opposing the Class Action settlement and taking positions adverse to the Albertses in the Personal Action. At trial, the parties and the court concentrated on the pre-August 1997 conduct as the basis for the professional malpractice action and the post-August 1997 conduct as the basis for the breach of fiduciary duty claim. Although this was certainly a reasonable approach for litigating these claims before a jury, this tactical choice is not controlling in determining whether the Albertses had a legally tenable basis to bring and continue to assert their legal malpractice claim. Although the Albertses relied primarily on the El Centro release issue to support their malpractice claim, that claim was objectively supported by the broader alleged misconduct in failing to advise the Albertses of the potential conflict when Franklin was first retained in the action and taking positions adverse to the Albertses while he was still representing them in their Personal Action.

Franklin argues that no reasonable attorney would have concluded the Albertses would prevail on a malpractice claim because the Albertses did not suffer any economic damages from Franklin's breaches of loyalty and failure to advise of the conflicts. However, Franklin does not dispute, and the jury clearly found, that the Albertses

suffered substantial emotional distress based on Franklin's breaches of loyalty to his clients. Under these circumstances, it was not unreasonable for an attorney to assert the professional malpractice claim under the line of cases suggesting that emotional distress damages may be recoverable on a professional negligence claim if the misconduct was particularly egregious. (See *Smith v. Superior Court* (1992) 10 Cal.App.4th 1033, 1040.) Although the general rule requires a plaintiff to establish economic loss to recover on a professional negligence claim, this does not "mean . . . that emotional distress damages can never be recovered in legal malpractice actions. It is possible to envision cases in which the attorney's conduct—while not necessarily intentional or in bad faith—is so reckless and the resulting damage is so foreseeable that imposition of liability is proper." (*Pleasant v. Celli* (1993) 18 Cal.App.4th 841, 854, disapproved on other grounds in *Adams v. Paul* (1995) 11 Cal.4th 583, 591, fn. 4; see also *Stanley v. Richmond* (1995) 35 Cal.App.4th 1070, 1097.)

Given Franklin's affirmative actions while he was serving as the Albertses' personal attorney, a reasonable attorney could have believed there was a meaningful possibility of convincing a court to apply this exception and permit the Albertses to recover purely emotional distress damages for their professional malpractice claim, even assuming they could not prove direct economic losses. "[I]n evaluating whether or not there was probable cause for malicious prosecution purposes, a court must properly take into account the evolutionary potential of legal principles." [Citation.] [T]here is probable cause for a claim if it is 'arguably "warranted by existing law" or at the very least . . . based on an objectively "good faith argument for the extension, modification, or

reversal of existing law.'" [Citation.]" (*Padres L.P. v. Henderson, supra*, 114 Cal.App.4th at p. 524, italics omitted.)

Moreover, the trial court's denial of Franklin's summary adjudication motion on the professional malpractice claim establishes the existence of probable cause in this case. The courts have held that a denial of a defense motion for summary judgment on the claim in the underlying case generally establishes probable cause as a matter of law. (*Zamos v. Stroud, supra*, 32 Cal.4th at p. 973, fn. 10; *Wilson v. Parker, Covert & Chidester, supra*, 28 Cal.4th at pp. 818-819; *Roberts v. Sentry Life Insurance* (1999) 76 Cal.App.4th 375, 384.) A trial court's ruling "that issues of material fact remain for trial 'necessarily impl[ies] that the judge finds at least some merit in the claim This finding . . . compels [the] conclusion that there is probable cause, because probable cause is lacking only in the *total absence* of merit.'" (*Wilson, supra*, at p. 819.)

To avoid this general rule, Franklin relies on an exception to the general rule providing that probable cause is not established where the denial of summary judgment was "induced by materially false facts submitted in opposition" to the motion. (See *Roberts v. Sentry Life Insurance, supra*, 76 Cal.App.4th at p. 384.) Seeking to fit within this exception, Franklin argues that the court's summary adjudication ruling was based on the "false" fact that he advised James not to sign the El Centro lease. This argument is unsupported by the record. The record shows the trial court did not deny the summary judgment motion based on Franklin's alleged negligent advice on the El Centro store release. Instead, the court relied on the facts showing that Franklin took positions adverse to his clients and that the Albertses suffered economic loss in the form of a

reduced settlement amount paid to the Class Action representatives. The question whether such facts ultimately supported a legal malpractice claim is not the issue here. What is significant is that an experienced trial judge who examined the evidence supporting the Albertses' claim reached a conclusion that the Albertses' professional negligence claim was viable. Given this finding and the fact that there is no showing the evidence relied upon by the court was materially false, we cannot find that all reasonable attorneys would find the professional negligence claim totally lacked merit.

We likewise find unavailing Franklin's focus on the fact that the trial court granted the anti-SLAPP motion on the malice issue rather than the probable cause element. Because the issue is one of law, we are not bound by the lower court's reasons for granting a motion to strike under the anti-SLAPP statute. (See *Mike Davidov Co. v. Issod* (2000) 78 Cal.App.4th 597, 610.) Moreover, the trial court never stated that it found that the Albertses had no probable cause to bring the malpractice claim. Instead, the court permitted additional evidence on malice and found against Franklin on this issue. Because each element is necessary to defeat an anti-SLAPP motion, the court had no need to additionally reach the probable cause issue, and its ruling does not reflect that it ruled on the issue. To defeat an anti-SLAPP claim, the plaintiff must substantiate *each* element of its alleged causes of action. (See *DuPont Merck Pharmaceutical Co. v. Superior Court* (2000) 78 Cal.App.4th 562, 568.)

III. *Malice*

Although we need not reach the issue, we additionally conclude that Franklin failed to meet his anti-SLAPP burden on the malice element. In a malicious prosecution

claim, the malice element relates to the subjective intent or purpose with which the defendant acted in initiating the prior action. (*Padres L.P. v. Henderson, supra*, 114 Cal.App.4th at p. 522.) To establish this element, the malicious prosecution plaintiff is required to show that the defendants had an improper motive in bringing the prior actions. (*Ibid.*) "Suits with the hallmark of an improper purpose are those in which: . . . "(1) the person initiating them does not believe that his claim may be held valid; (2) the proceedings are begun primarily because of hostility or ill will; (3) the proceedings are initiated solely for the purpose of depriving the person against whom they are initiated of a beneficial use of his property; (4) the proceedings are initiated for the purpose of forcing a settlement which has no relation to the merits of the claim." (George F. Hillenbrand, Inc. v. Insurance Co. of North America (2002) 104 Cal.App.4th 784, 814.)

In light of the jury's findings on the breach of fiduciary claims and the fact that the malpractice and breach of fiduciary duty claims potentially arise from similar circumstances, there is no reasonable probability that a jury would find that the Albertses included the malpractice claim in their lawsuit because of an improper motive. Although the motive element of a malicious prosecution claim requires a factfinder to focus on the individual claim that is alleged to have been brought improperly, the claim must be considered in context of the entire prior lawsuit. Given that the Albertses' prior lawsuit had substantial merit and the jury's findings that Franklin breached his fiduciary duties

owed to his clients, no reasonable jury would find the inclusion of a malpractice claim in the lawsuit was brought with malice.⁴

DISPOSITION

Judgment affirmed. Franklin to pay the Albertses costs on appeal.

HALLER, Acting P. J.

WE CONCUR:

McDONALD, J.

McINTYRE, J.

⁴ Because the Albertses did not argue in the trial court proceedings that Franklin could not additionally meet the "favorable termination" element, we do not reach the "favorable termination" element in this opinion. We note, however, that based on our own research and on information contained in letter-briefs requested from the parties, it appears to us that Franklin would be also unable to satisfy this element. Unlike the probable cause element, the "favorable termination" element is analyzed based on an examination of the entire case, not merely the particular cause of action. (See generally *Crowley v. Katleman*, *supra*, 8 Cal.4th at p. 686; *Dalany v. American Pacific Holding Corp.* (1996) 42 Cal.App.4th 822, 829-830.) Certainly, Franklin did not prevail in the prior action.